APPEAL NO. 93085

This appeal arises under the Texas Workers' Compensation Commission Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On January 5, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole unresolved issue was:

Whether claimant sustained an accidental injury to his neck in the course and scope of his employment on (date of injury).

The hearing officer determined that claimant sustained a compensable injury on (date of injury) in the course and scope of his employment.

Appellant, carrier herein, contends that the hearing officer misapplied the facts, the law, and the argument presented at the hearing, and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The carrier aptly characterizes this case as "a medical only, `stiff neck' claim." The facts, except as to the critical issue, are fairly simple and undisputed. Claimant was a 29-year-old operator of a catalytic cracking unit employed by the employer. Claimant, on (date of injury), was working the night shift, approximately 7:00 p.m. to 7:00 a.m. On the evening in question the claimant was in good health, with no physical complaints and arrived at work at 6:30 p.m. He reviewed the log book, the night orders and relieved the person on the prior shift. After completing the relief and reviewing orders, the claimant went outside and made a general round which consisted of checking oil levels, and vibration of the pumps, feeling the pumps if they were hot, taking readings and recording them. It is undisputed that this part of claimant's duties did not require any strenuous work. It is upon completion of this first round that the testimony becomes murky, inconsistent and subject to differing interpretation.

The carrier asserts the testimony was that after spending the first hour or so doing the first round, the claimant "sat down a bit before beginning HSP." HSP was described by claimant as cleaning the unit, carrying soap buckets, washing down cement, scrubbing, carrying water hoses and generally doing more physical work. Claimant's attorney contends that "[f]ollowing his maintenance rounds, claimant performed `HSP'" and "[a]fter completing his HSP rounds, claimant was watching a required safety videotape when his neck was (sic) started hurting him." Carrier maintains the testimony shows that claimant "admitted that he sat down before beginning HSP" and that claimant told his supervisor, (Mr. T) "that he first noticed his neck bothering him after his first round of outside duties . . ." The

hearing officer in his statement of evidence mentions claimant's first round and then states "[a]fter a short break [claimant] then started doing what he terms `HSP.'" The hearing officer then describes what HSP is and states "[w]hen he went on break he noticed that his neck was beginning to stiffen up. As he was watching a required videotape his neck started hurting him." The key point here was whether the claimant helped a coworker with a hose and did any HSP before he went on break, felt his neck begin to stiffen up and watched the video.

Carrier maintains the break and notice of the stiff neck was after the nonstrenuous first maintenance round and claimant's attorney maintains HSP was performed before the break, notice of stiffness and video. A careful review of the transcript indicates that the claimant was unclear about the sequence of events, whether there were two breaks, one before HSP and one after he assisted a coworker by carrying a hose and performing HSP. In any event, the circumstances after this hotly contested time frame are again undisputed. Claimant, after watching the video, complained to his supervisor, Mr. T, that his neck was hurting. The pain worsened through the night and by 4:30 a.m. claimant's neck had swelled and it was difficult for him to move his head. When the relief shift came, the "step-up foreman," (Mr. B), suggested claimant see Mr. B's chiropractor but claimant said he would try to sleep it off. However, the neck pain did not get better and claimant called in and spoke with Mr. B who recommended a chiropractor. Claimant went to (Dr. G) who put claimant in a neck brace and gave him an off-duty slip for three days. Claimant thereafter returned to what he describes as light duty and he has continued to improve and has missed no additional time from work.

The hearing officer sums up the sequence of events during the disputed time frame in his statement of evidence as follows:

> Cross examination consisted of a rather detailed and exhaustive inquiry into whether claimant had first mentioned his neck problem after he finished his "rounds" or after he had been performing "HSP." His testimony was that he did not complete his rounds until about 8:30 and that he had first said that his complaint was made after these rounds but now contended that his problem was a result of "HSP" which did not begin until after 8:30. He stated that he did not mention the hoses to anybody until about two weeks ago.

We find this is a fairly accurate interpretation of claimant's testimony on cross-examination. Claimant at the CCH testified he helped a coworker, (Mr. H) carry some hoses used for cleaning, while performing HSP. Claimant testified he had forgotten about the hoses until in a recent conversation with Mr. H, when he had been reminded of carrying the hoses to help Mr. H. Claimant now believes carrying the hoses caused his stiff neck.

Carrier sees the issue as being "[w]hether or not the Claimant's `stiff neck' constitutes

an accidental injury. . ." Carrier cites Olson v. Hartford Accident and Indemnity Co., 477 S.W.2d 859 (Tex. 1972) for the proposition that for there to be an accidental injury, "there must be an undesigned, untoward event traceable to a definite time, place and cause." We do not disagree with this general statement of the law in Texas. Both carrier and claimant cite many of the same cases as authority for their respective positions. These cases are Morgan v. Compugraphics Corp., 675 S.W.2d 729 (Tex. 1984); Texas Employers Insurance Association v. Thompson, 610 S.W.2d 208 (Tex. App.-Houston [1st Dist.] 1980, no writ); Hartford Accident and Indemnity Company v. Contreras, 498 S.W.2d 419 (Tex. App.-Houston [1st Dist.] 1973, writ ref'd n.r.e.); Transport Insurance Company v. McCully, 481 S.W.2d 948 (Tex. App.-Austin, 1972, writ ref'd n.r.e.); and Transport Insurance Company v. Campbell, 582 S.W.2d 173 (Tex. App.-Houston [1st Dist.] 1979, writ ref'd n.r.e.) Contreras, *supra* citing Olson, *supra*, said that the lifting of 50 pound bags was sufficient exertion to meet the definite time, place and cause test. McCully, *supra*, a heart attack case where the employee "loaded and unloaded a considerable amount of baggage" over a two hour period, was sufficient to meet the test in Olson, *supra*. The court in McCully, page 950, held ". . . Olson does not require that the . . . claimant shoulder the near impossible burden of proving which specific task during the two hour period precipitated his attack. It is proof enough to show . . . physical strain over the two hour period followed by physical pains. . . ." We do not find Thompson, *supra*, a case involving medical causation where a sandblasting machine struck an employee's face and chest causing total and permanent disability, and Campbell, *supra*, where a blow to the employee's head producing total incapacity due to a stroke, as being persuasive in this case. Morgan, *supra*, stands for the proposition that lay testimony is adequate to prove causation in those cases in which general experience and common sense will enable a layman to determine, with reasonable probability, the causal relationship between the event and the condition, that case involving a sequence of events from which the trier of fact could infer that the release of chemical fumes caused the employee to suffer injury.

We would distinguish our decisions in Texas Workers' Compensation Commission Appeal No. 92092, decided April 27, 1992 and Texas Workers' Compensation Commission Appeal No. 92337, decided August 21, 1992 from the instant case. Appeal No. 92092 was a situation where the appellant noticed a pain in his groin area one night at home after eating a large meal. The next day he noticed a bulge which was later diagnosed as a hernia. Appellant in that case attempted to trace his hernia to a 16 month period where he was lifting and carrying heavy objects during his employment. We affirmed the hearing officer who found the evidence did not establish a causal connection between claimant's employment and the hernia. In a detailed analysis in Appeal No. 92092, *supra*, we discussed many of the cases carrier cites in its brief in the instant case. We would note that the fact situation in Appeal No. 92092 is clearly distinguishable from the instant case where the complained of injury is traceable to a few minutes in time while claimant was clearly on the employer's premises performing duties in furtherance of the employer's business. Appeal No. 92337, *supra*, was a case where a 61-year-old employee with a history of medical problems alleged

that work-related stress caused an elevated blood pressure which then interacted with her herpes zosters to change it to a debilitating injury. In that case we held that the appellant was unable to connect her claimed injury to any particular event occurring in the course and scope of her employment. The evidence in that case simply did not support a claim of an accidental injury, from a particular work-related event, traceable to a definite time, place, and cause.

Contreras and McCully, cited earlier, have established that if there is physical strain or exertion (lifting 50 to 100 pound bags in Contreras and loading/unloading a considerable amount of baggage in McCully) followed by the onset of the injury that is sufficient to meet the Olson test that the injury must be established by an undesigned, untoward event traceable to a definite time, place, and cause. If one believes, as apparently did the hearing officer, that claimant in this case performed HSP which included mopping, carrying buckets and helping a coworker move a hose, before sitting down to watch the safety videotape at which time he noticed the stiffness in his neck, that would be sufficient physical strain or exertion to meet the Olson test. Carrier argues that claimant took a break and noticed stiffness in his neck after his nonstrenuous first round and before he did any of the HSP. The carrier is absolutely correct in stating "[t]he crux of the case boils down to whether or not the stiff neck resulted from the claimant's performance of HSP, or the simple occurrence of a stiff neck following admitted nonstrenuous activity."

The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). The hearing officer clearly understood the issue and cited applicable law as evidenced in his discussion where he states:

> The law does not demand that [claimant] be able to point to an accident. The prompt onset of symptoms following work calculated to produce the symptoms is sufficient to satisfy the burden of proving a definite time and place. The sequence of events is consistent with the occurrence of this type injury.

The hearing officer also believed that claimant experienced his neck stiffness after he performed HSP as evidenced in his Finding of Fact No. 5. In addition to being the sole judge of the weight and credibility of the evidence, when presented with conflicting evidence, the hearing officer, as the trier of fact, may resolve inconsistencies in the testimony of any witness. McGallaird v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986). We will not disturb his decision unless it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Carrier also alleges "harmful error insofar as [the hearing officer] admitted Claimant's

Exhibit No. 10 and excluded Claimant's Exhibit No. 9, which errors resulted in an erroneous decision." A careful review of the transcript clearly shows at pages 59-61 that the hearing officer in fact admitted Claimant's Exhibit No. 9 (a notice of injury form) and excluded Claimant's Exhibit No. 10 (Notice of OSHA citation). Unfortunately the list of exhibits, on page 3 of the Decision and Order, shows Claimant's Exhibit No. 10 (Notice of OSHA citation) admitted and Claimant's Exhibit No. 9 (Notice of Injury) not admitted. From the record it is abundantly clear the hearing officer intended to admit the Notice of Injury and not the Notice of OSHA Citation. Any error appears to have been made in recording which exhibit was admitted on page 3 of the decision. If there was any error in the listing of the exhibits it was harmless error. To obtain a reversal on this point carrier must show that the error was reasonably calculated to cause and probably did cause rendition of an improper decision. *See* Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. Civ. App.-San Antonio 1981, no writ). Carrier's appeal on this point is not well taken.

The decision of the hearing officer is not so contrary to the great weight of the evidence as to be clearly wrong and unjust and is hereby affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge